

Regional Integration and *Pacta Sunt Servanda*: Reflections on South African Trans-Border Higher Education Policies

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Date published

12 December 2016

Editor Prof S du Toit

How to cite this article

Mwanawina I "Regional Integration
and *Pacta Sunt Servanda*:
Reflections on South African Trans-
Border Higher Education Policies"
PER / PELJ 2016(19) - DOI
[http://dx.doi.org/10.17159/1727-
3781/2016/v19i0a1662](http://dx.doi.org/10.17159/1727-3781/2016/v19i0a1662)

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DOI

[http://dx.doi.org/10.17159/1727-
3781/2016/v19i0a1662](http://dx.doi.org/10.17159/1727-3781/2016/v19i0a1662)

Abstract

The underpinning essence of being part of a regional organisation such as the Southern African Development Community (SADC) is to achieve development through integration. Regional integration thus becomes the bedrock from which the treaties governing SADC and its member states are to be interpreted. The *SADC Treaty* and its various protocols articulate that members should eliminate obstacles to the free movement of people, goods and services. This should include the progressive reduction of immigration formalities in order to facilitate the freer movement of students and staff for the specific purposes of study, teaching, research and any other pursuits relating to education and training. Relying on international law principles such as *pacta sunt servanda*, this article establishes that though South Africa has made much progress in meeting most of the SADC obligations relating to migration and education, there are still grey policy areas that fall short of SADC standards and regional commitments. It also appraises the role of the SADC Council of Ministers, the Parliamentary Forum, the Tribunal and the National Committees in addressing these areas.

Keywords

SADC; Immigration; regional integration; mobility.

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1 Introduction

Regional integration is a dynamic process that demands a country's willingness to share or combine into a larger establishment with other countries. The politico-economic aspects that such a country shares with others are determined by the legal framework of the organisation that it joins, and other supporting protocols or decisions made at regional level.¹ Southern African Development Community (SADC) regional integration efforts have been characterized by the pursuit of economic development through a focus on areas such as infrastructure and services, industry, trade, human resources development, science and technology, natural resources² and, for purposes of this paper, education³ and the mobility of goods and services across political boundaries.⁴ These focus areas were identified by the SADC as the key areas necessary to foster regional development and integration.⁵ This article will begin by explaining how SADC functions as an intergovernmental organisation and relates to its member states, how South Africa as a SADC member state is obliged to fulfil the obligations it agreed to at regional level through the principle of *pacta sunt servanda*, and how various immigration laws enacted by South Africa impact negatively on the regional obligations espoused in the *SADC Treaty*, the *Protocol on Education and Training*, and the *Protocol on the Facilitation of Movement of Persons*.

2 The nature of regional integration

Regional integration can be attained through pursuing various institutional arrangements. The simplest is the free-trade zone, an area in which domestic obstacles to trade and services are dismantled; this means that customs tariffs are not imposed on the products of any member country. In a customs union a common external tariff is established, stabilising the amount that products coming from the rest of the world have to pay to enter the area. This implies that the member countries form a single entity in the arena of international trade. A common or single market is a

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¹ Mansfield and Milner 1999 IO 589-600.

² Article 21(3) of *SADC Treaty* (1992).

³ *SADC Protocol on Education and Training* (1997).

⁴ *SADC Protocol on the Facilitation of Movement of Persons* (2005).

⁵ Article 21 of *SADC Treaty* (1992).

customs union to which the free mobility of productive factors between the member countries and a common trade policy are added. It contemplates the co-ordination of sectoral macro-economic policies among its members and requires the harmonization of national legislation. Fourth, an economic union joins centralised monetary institutions and common financial policies to the single market. It goes beyond simple coordination and includes the establishment of unified supra-national agencies.⁶

The integration path chosen by African states can be traced back to the genesis of the Organisation of African Unity (OAU). In the pan-Africanist debates that ushered in the birth of the OAU, there was a contestation of opinion between African leaders that wanted to establish a single United States of Africa in which a supra-national government would be established and those who favoured a more moderate, functionalist approach towards a gradual integration of the continent. The 1963 OAU Addis Ababa Summit adopted as policy the gradual approach to unity.⁷ In 1991 the OAU signalled its intention to establish a continent-wide economic union through the adoption of the *Treaty Establishing the African Economic Community*.⁸ This plan was adopted by member states while acknowledging that full economic unity would not be attained instantly, but that a gradual plan of action would have to be followed. In an effort to gradually move towards continent-wide economic unity, in 2006 the AU Banjul Summit resolved to recognise eight Regional Economic Communities on the African continent, one of which was the SADC. This then requires of SADC member states to ensure that they dismantle obstacles to integration within their region in order for the AU to successfully drive forward the future goal of continental unity.

The free movement of persons within an integrated region is crucial to the success of regional objectives. It is when movement has been liberalised that a region can be deemed to be united. Barriers to the free movement of persons include non-standardised visa fees and procedures for immigration, cumbersome and duplicated immigration procedures in connection with applications for work or study visas, corruption, and xenophobic sentiments. The combination of these barriers tends to cumulatively reduce the transfer of experienced and qualified labour amongst SADC member states and tends to stifle the enthusiasm of member states for harmonious cooperation. In other instances regional

⁶ Malamud *Overlapping Regionalism* 2.

⁷ Rossi 1974 *Int J Polit* 15-34.

⁸ *Treaty Establishing the East African Community* (1999), adopted on June 3, 1991 at Abuja.

access to education is severely hampered, as will be illustrated later in this work. The benefits of regional integration are mutual for both the region and the host country. Apart from the cross-cultural exchanges and the transfer of expertise and technology, the education sector is an estimated 35 billion dollar market per annum. Since education services are traded primarily through student mobility across borders (consumption abroad) and the largest current source of receipts for higher education services is comprised of student fees paid to attend traditional colleges and universities in host countries,⁹ it makes economic sense for the SADC region to assess if national policies promote or stifle regional progress in relation to education and mobility.

3 An overview of SADC and international law

In accordance with the 2006 Banjul Summit decision, the African Union (AU) recognises SADC as a one of the regional economic groups that exist on the African continent. SADC is therefore one of the building blocks of the AU's broader strategy to achieve the goals outlined in the *Lagos Plan of Action* and the *Treaty Establishing the African Economic Community* (AEC).¹⁰ The founding treaties of most of the regional economic groups including SADC contain provisions that establish such a union or community¹¹ and provide that such a union or community shall be an international organisation with legal personality or with the capacity and power to enter into contracts, acquire, own or dispose of movable or immovable property, and shall be able to sue and be sued.¹²

These provisions endow regional economic groups with legal personality that is cardinal to the execution and achievement of their objectives. In comparison to a state, where the exercise of public power is constrained by legislation, the conduct of regional organisations is governed by treaties with member states as its subjects. The legal status of international organisations was well articulated in the International Court of Justice Advisory Opinion (Reparation case) of 11 April 1949, in which the Court

⁹ Pillay, Maasen, and Cloete *GATS and Higher Education in the SADC* 8.

¹⁰ *Lagos Plan of Action* (1980-2000) and *Treaty of the African Economic Community* (1991).

¹¹ See art 1 of the *Treaty Establishing the Arab Maghreb Union* (1989); art 2 of the *Treaty Establishing the Economic Community of Central African States* (1983); art 3 of the *SADC Treaty* (1992); art 88 of the *Treaty of the Economic Community of West African States* (revised) (1993); art 186 of the *Treaty Establishing a Common Market for Eastern and Southern Africa* (1993); art 1A of the *Agreement Establishing the Inter-Governmental Authority on Development* (1996); and art 138 of the *Treaty Establishing the East African Community* (1999).

¹² Article 3(1) of *SADC Treaty* (1992).

expressed the opinion that an intergovernmental organisation was an international person and, though it was not the same thing as a state, it was a subject of international law, was capable of possessing international rights and duties, and had the capacity to maintain its rights by bringing international claims.¹³

The architecture of SADC as outlined in the Treaty¹⁴ is such that the SADC Summit is the highest decision-making body responsible for the overall policy direction of the organisation. It is composed of the Heads of State of the member states to the organization.¹⁵ The SADC Secretariat is responsible for the strategic planning, co-ordination and management of SADC programmes. It is headed by an Executive Secretary and has its headquarters in Gaborone, Botswana.¹⁶ The Tribunal is the judicial organ of the community, and has jurisdiction over contentious and non-contentious proceedings of the organisation. It is mandated to ensure adherence to and the proper interpretation of the provisions of the *SADC Treaty* and subsidiary instruments and to adjudicate upon such disputes as may be referred to it.¹⁷ However, the execution of this mandate has been marred by its suspension and the review of its functions following a 2011 Summit decision.¹⁸ The Council of Ministers consists of Ministers from each member state, usually from the Ministries of Foreign Affairs and Economic Planning or Finance, as recommended in the Treaty. The Council is responsible for overseeing the functioning and development of SADC and ensuring that policies are properly implemented.¹⁹ The SADC Parliamentary Forum is a regional inter-parliamentary body which aims to provide a platform for parliaments and parliamentarians to promote and improve regional integration in the SADC region through parliamentary involvement.²⁰ The Standing Committee of officials consists of one permanent secretary or an official of equivalent rank from each member state, preferably from a ministry responsible for economic planning or finance.²¹ The Committee is basically a technical advisory committee to the Council of Ministers. The SADC National Committees co-ordinate their respective individual member state interests relating to SADC at a national

¹³ *Reparation for Injuries Suffered in the Service of the United Nations* Advisory Opinion of 11 April 1949, ICJ Reports 1949, 174.

¹⁴ Articles 9(1)(a)-(h) of the *SADC Treaty* (1992).

¹⁵ Article 10 of the *SADC Treaty* (1992).

¹⁶ Article 14 of the *SADC Treaty* (1992).

¹⁷ Article 16 of the *SADC Treaty* (1992).

¹⁸ *SADC Extraordinary Summit*: 20th May 2011.

¹⁹ Article 11 of the *SADC Treaty* (1992).

²⁰ Established in terms of art 9(2) of the *SADC Treaty* (1992).

²¹ Article 13 of the *SADC Treaty* (1992).

level. They are established in each member state in accordance with article 16A of the Treaty.²² Their function involves two dynamics; they provide input from the national level into regional policy, as well as overseeing the implementation of regional policy at the national level.²³ This is a very important function that is explored in the recommendations of this paper.

From this overview of the main structures of SADC, it is possible to conclude that each member state is well represented at all levels of the organisation. This is reflective of the founding principles of the treaty, such as the sovereign equality of all member states, democracy, the rule of law, equity, balance, and mutual benefit.²⁴ The objectives of SADC, which are closely linked to the crux of this paper, include amongst others the achievement of complementarity between national and regional strategies;²⁵ the promotion and maximisation of productive employment;²⁶ the harmonisation of the political and socio-economic policies of member states,²⁷ and the development of policies aimed at the progressive elimination of obstacles to the free movement of capital and labour.²⁸ Other objectives and obligations are developed through the conclusion of protocols in accordance with article 22 of the Treaty. This paper focuses on two main protocols, the *Protocol on Education and Training* and the *Protocol on the Facilitation of Movement of Persons*.²⁹

3.1 *Pacta sunt servanda?*

A member state to a regional arrangement such as SADC is often faced with the need to reconcile national and regional priorities. From a national perspective, citizens may require the government to protect their resources and opportunities from perceived loss to migrants, whereas the integration framework requires of the government not to frustrate the movement of persons within the region. It is thus important to shed light on the position of international law in this regard. The maxim *pacta sunt servanda* loosely translates into the idea that a state is bound to carry out its obligations under a treaty in good faith.³⁰ It has been established so far

²² Article 16A of the *SADC Treaty* (1992).

²³ Van der Vleuten and Merran 2013 <https://www.ciaonet.org/catalog/32478> 63.

²⁴ Article 4 of the *SADC Treaty* (1992).

²⁵ Article 5(1)(e) of the *SADC Treaty* (1992).

²⁶ Article 5(1)(f) of the *SADC Treaty* (1992).

²⁷ Article 5(2)(a) of the *SADC Treaty* (1992).

²⁸ Article 5(1)(e) of the *SADC Treaty* (1992).

²⁹ *SADC Protocol on Education and Training* (1997); *SADC Protocol on the Facilitation of Movement of Persons* (2005).

³⁰ *S v Tuhadeleni* 1969 1 SA 153 (A).

that SADC is an international organisation with legal personality. It has also been shown that the manner in which SADC functions is outlined in the SADC treaty and that the treaty allows member states to adopt new protocols which ultimately add to the body of obligations for member states. South Africa joined SADC by acceding to the Treaty on 29 August 1994. Since this was before the *1996 Constitution* came into effect, the senate and national assembly approved the Treaty on 13 and 14 September 1995, respectively.³¹ By acceding to the treaty South Africa indicated its consent to being bound by the Treaty, as section 231(3) of the *Interim Constitution* provided that where Parliament agrees to the ratification of or accession to an international agreement, such an international agreement shall be binding on the Republic and shall form part of the law of the Republic, provided Parliament expressly so provides and the agreement is not inconsistent with the *Constitution*. In addition, the *Vienna Convention on the Law of Treaties* reiterates the same principle relating to accession.³² The *1996 Constitution* under section 231 affirms that those agreements entered into before the *1996 Constitution* are still binding.

Though South Africa is not party to the *Vienna Convention on the Law of Treaties*, it is bound by the provisions of the Convention.³³ The Convention is a compilation of many provisions which reflect the rules of customary international law.³⁴ South African courts have been willing to accept that customary international law forms part of South African law³⁵ to the extent that it is not inconsistent with the *Constitution* or an Act of Parliament.³⁶ The *Constitution* further provides that when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.³⁷

It is after clarifying these positions that it becomes evident how the notion of *pacta sunt servanda* finds application in South African international relations. The *Vienna Convention* articulates that every treaty in force is

³¹ See ss 231, 36 of the *Constitution of the Republic of South Africa Act 200 of 1993*; *Government of the Republic of Zimbabwe v Fick* 2013 5 SA 325 (CC) para 5.

³² Articles 2(1)(b), 15 of the *Vienna Convention on the Law of Treaties* (1969).

³³ DIRCO 2015 <http://www.dfa.gov.za/chiefstatelawadviser/general.html>.

³⁴ *Harksen v President of the Republic of South Africa* 2000 2 SA 825 (CC) para 26.

³⁵ *South Atlantic Islands Development Corporation Ltd v Bucha* 1971 1 SA 234 (C) 238.

³⁶ See s 231(3) of *Constitution of the Republic of South Africa Act 200 of 1993*; s 232 of the *Constitution of the Republic of South Africa, 1996*.

³⁷ Section 233 of the *Constitution of the Republic of South Africa, 1996*.

binding upon the parties to it and must be performed by them in good faith.³⁸ It also provides that a party may not invoke the provisions of its internal law as a justification for its failure to perform a treaty.³⁹ The International Court of Justice's application of article 26 may be found in a dispute between Hungary and Czechoslovakia over a treaty concerning the construction and operation of the Gabčíkovo-Nagymaros system of locks.⁴⁰ The Treaty was not only a joint investment project for the production of energy, but it was designed to serve other objectives such as the improvement of the navigability of the Danube, flood control, the regulation of ice discharge, and the protection of the natural environment. These objectives, in the light of article 26, implied that it was the purpose of the Treaty, and the intentions of the parties in concluding it, that should prevail over its literal application. The principle of good faith obliged the Parties to interpret the treaty obligations in such a manner that its purpose could be realised.⁴¹ In another matter arising out of an agreement between the United Kingdom of Great Britain and Northern Ireland, and the United Republic of Tanzania, in which the parties sought to collaborate on a water and sewerage infrastructure project in Tanzania, the International Centre for Settlement of Investment Disputes (ICSID) expressed the opinion that:⁴²

... the implicit confidence that should exist in any legal relation is based on the good faith with which the parties must act when entering into the legal relation, and which is imposed as a generally accepted rule or standard. Asserting the contrary would imply supposing that the commitment was assumed to be breached, which is an assertion obviously contrary to the maxim *pacta sunt servanda*, unanimously accepted in legal systems.

In both the ICJ and ICSID judgments, article 26 of the *Vienna Convention* is viewed as entailing that parties to an international agreement must remain true to the purpose and the objectives of such an agreement. Incidentally, the *SADC Treaty* under article 6 contains similar provisions that prohibit member states from engaging in any measures that are likely

³⁸ Article 26 of the *Vienna Convention on the Law of Treaties* (1969).

³⁹ Article 27 of the *Vienna Convention on the Law of Treaties* (1969).

⁴⁰ *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* Judgment of 25 September 1997, ICJ Reports 1997, 7 para 142.

⁴¹ *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* Judgment of 25 September 1997, ICJ Reports 1997, 7 paras 125-154.

⁴² *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania* (International Centre for Settlement of Investment Disputes) Case No ARB/05/22.

to jeopardise the sustenance of its principles, the achievement of its objectives, and the implementation of the provisions of the treaty.⁴³

3.2 SADC Protocols on education and mobility

The *Protocol on Education and Training* provides that member states should work towards the reduction and eventual elimination of constraints to better and freer access by citizens of member states to good quality education and training opportunities within the region,⁴⁴ and to work towards the relaxation and eventual elimination of immigration formalities in order to facilitate the freer movement of students and staff within the region for the specific purposes of study, teaching, research and any other pursuits relating to education and training.⁴⁵ The protocol also requires that students from SADC countries are to be treated the same as home students for the purposes of fees and accommodation in higher education,⁴⁶ and in addition that socially disadvantaged groups are to be given preference in admission to fields of study where they have not featured prominently. Where necessary, governments are encouraged to provide special scholarships for students from socially disadvantaged groups.⁴⁷ South Africa has made considerable progress towards meeting the obligations described in article 4-5 of the Protocol, which requires that member states increase the provision of and access to education and training, address gender inequality, and develop systems that ensure that relevant quality education is made available at primary and secondary levels. The Department of Basic Education's *Action Plan to 2014: Towards the Realisation of Schooling 2025* (currently succeeded by the *Action Plan to 2019: Towards the Realisation of Schooling 2030*) ensures that previously disadvantaged citizens are afforded opportunities to access education. Various programmes such as the National School Nutrition Programme, Scholar Transport and No Fee School Policy are continuously being expanded for the primary and secondary education level.⁴⁸ Quality management efforts are also evident in the 2009 review of the Implementation of the National Curriculum Statement, following the

⁴³ See art 6(1) of the *SADC Treaty* (1992); art 6(5) of the *SADC Treaty* (1992) provides that member states shall take all necessary steps to accord this Treaty the force of national law. Art 20 of the *Protocol on Education and Training* provides that member states shall take all steps required to give effect to the Protocol within their national territories.

⁴⁴ Article 3(f) of the *SADC Protocol on Education and Training* (1997).

⁴⁵ Article 3(g) of the *SADC Protocol on Education and Training* (1997).

⁴⁶ Article 7(5) of the *SADC Protocol on Education and Training* (1997).

⁴⁷ Article 7(2) of the *SADC Protocol on Education and Training* (1997).

⁴⁸ DBE *Education for All*; DBE *South African Country Report*.

expression of public concern about the appropriateness of the introduction of outcomes-based education.⁴⁹ The *SADC Protocol* requires that member states reserve admission opportunities for SADC students in universities and further harmonise university requirements in terms of article 7(1)-(2). This too has been achieved by South African tertiary institutions, in collaboration with the South African Qualifications Authority, which is tasked with evaluating and advising on matters relating to foreign qualifications as per section 13(1)(m) of the *National Qualifications Framework Act*.⁵⁰

Incidental to some of the provisions outlined in the *Education Protocol* is the *Protocol on the Facilitation of Movement of Persons*. The genesis of this Protocol was such that in 1995 SADC announced a *Draft Protocol on the Free Movement of Persons in the Southern African Development Community (SADC)*.⁵¹ This Protocol proposed that citizens of the region would have the following rights; the right to enter the territory of another member state freely and without a visa for a short visit; the right to reside in the territory of another member state; and the right to establish oneself and work in the territory of another member state. The vision of the protocol would be achieved over the following phases; Phase 1 was to see the visa-free entry of SADC nationals into member states for short visits not exceeding six months. Phase 2 was to see the rights of residence extended to all SADC nationals, while phase 3 was to result in the right to establish, including the right to work. Phase 4 aimed to result in the elimination of all internal national borders between SADC member states.⁵² These proposals generated much resistance from South Africa, Botswana and Namibia,⁵³ and a revised draft was announced in 1997, the *Draft Protocol on the Facilitation of Movement of Persons*, which shifted the focus of the protocol from "free movement" to "facilitated movement" and removed the rights enshrined in the previous Protocol. Another "refined" version of the protocol was tabled at the SADC Summit that was held in 2005, where it was approved and signed.⁵⁴ The 2005 Protocol, though heavily revised, proposes various actions aimed at facilitating the movement of persons within Southern Africa. In its presentation to the

⁴⁹ Task Team *Final Report*.

⁵⁰ *National Qualifications Framework Act* 67 of 2008.

⁵¹ *Draft Protocol on the Free Movement of Persons in the Southern African Development Community (SADC)* (1995).

⁵² See generally Solomon *Towards the Free Movement of People*.

⁵³ See generally Williams and Carr 2006 <http://www.queensu.ca/samp/sampresources/samppublications/policybriefs/brief18.pdf>.

⁵⁴ Williams and Carr 2006 <http://www.queensu.ca/samp/sampresources/samppublications/policybriefs/brief18.pdf>.

National Council of Provinces Committee on Social Services, the South African Department of Home Affairs noted that historical and cultural linkages and the need for economic integration were amongst others the basis of the protocol.⁵⁵ The Protocol encourages the abolition of visa requirements where they still exist, provided that where visas are regarded as necessary, they shall be issued gratis at the port of entry.⁵⁶ In pursuit of the objectives outlined in this protocol, and in particular article 13(a), the South African visa regime waives visas for short-term visits (for up to 90 days in a calendar year) to South Africa. For the purposes of residence, establishment, work or study, as required by article 17-18 of the *SADC Protocol*, there are specific regulations outlined in the Immigration Act and requirements to each, as will be discussed in paragraph 3.1.1 and 3.1.2 of this work. In addition, the *Immigration Act* empowers the relevant national authorities to deny, withdraw, or alter visas as well as to prohibit or declare certain persons to be undesirable.⁵⁷ These provisions are in line with articles 22 and 25 of the Protocol. Also, through the *Refugees Act*,⁵⁸ which establishes the institutions and procedures to offer protection to those who are fleeing persecution and instability in their home countries, South Africa is able to meet the obligations enumerated in article 28 of the Protocol. As a rule in inter-state relations the protocol requires that member states ensure that all their national laws, statutory rules and regulations are in harmony with the objectives of the Protocol.⁵⁹ Bearing all these important milestones in mind, the scope of this article will not be to evaluate the whole body of SADC obligations against South African legislation. This would be impractical. Rather, the narrower crux of this work is to appraise how specific South African immigration provisions militate against some of the objectives of the two SADC protocols that this article has chosen to deal with, within a higher education context.

3.3 The contrast between South African domestic legislation and SADC interests

This paper has thus far identified the objectives of the *SADC Treaty* that relate to the achievement of complementarity between national and regional strategies: the promotion and maximisation of productive employment; the harmonisation of the political and socio-economic

⁵⁵ PMG 2006 <https://pmg.org.za/committee-meeting/7610/>.

⁵⁶ Article 13(f) of the *SADC Protocol on the Facilitation of Movement of Persons* (2005).

⁵⁷ Section 30 of the *Immigration Act* 13 of 2002.

⁵⁸ *Refugees Act* 130 of 1998

⁵⁹ Article 7 of the *SADC Protocol on the Facilitation of Movement of Persons* (2005).

policies of member states and the development of policies aimed at the progressive elimination of obstacles to the free movement of capital and labour. It has also highlighted the provisions of the *Education and Training Protocol* that amongst other things require member states to progressively eliminate formalities that hamper the free movement of staff and students, to treat home and SADC students the same, and to provide scholarships for the socially disadvantaged. In addition, the provisions of the *Protocol on the Facilitation of Movement of Persons* requires various immigration reforms from member states in order to achieve the SADC objectives. The comparison between the regional obligations and the national position in South Africa begins here.

The regulation of the admission of foreign nationals, their residence and departure from the Republic of South Africa is regulated by the *Immigration Act 13 of 2002* *Immigration Amendment Acts*⁶⁰ read in tandem with the *Immigration Regulations* of 2014.⁶¹ The Acts regulate the issuance and conditions attached to a whole range of documentation including visitors' visas with authorization to work, retired visas, spouses and dependent children's visas, study visas, business visas, work visas and corporate visas.⁶² In the light of the recent waves of organised crime, human trafficking, child abductions and terrorist threats on the African continent, credit is due to South Africa for being proactive in closing the gaps that rendered the country vulnerable to such activities. In fact, the government has highlighted that these concerns are the areas that prompted the implementation of the new *Immigration Regulations* in 2014.⁶³ Much attention has been given to assessing and monitoring the effects of the regulations on the tourism industry but very little attention has been directed at reflecting on the regulations against the backdrop of the international law commitments that this paper has identified thus far.⁶⁴ For the purposes of this paper, this work will confine itself to the area of study visas and work visas.

Generally, any form of visa application has to be accompanied by a valid passport, a yellow-fever vaccination certificate, and a medical and radiological report; in respect of dependent children accompanying the applicant or joining the applicant in the Republic, proof of parental

⁶⁰ *Immigration Amendment Act 3 of 2007; Immigration Amendment Act 13 of 2011.*

⁶¹ GN R413 in GG 37679 of 22 May 2014 (*Immigration Regulations*).

⁶² Regulations 11-24 of the *Immigration Regulations*.

⁶³ PMG 2014 <https://pmg.org.za/committee-meeting/17420/>.

⁶⁴ Gigaba 2015 <http://www.home-affairs.gov.za/index.php/statements-speeches/570-governance-administration-media-briefing-parliament-cape-town-tuesday-17-february-2015>.

responsibilities and rights, or written consent in the form of an affidavit from the other parent or legal guardian; in respect of a spouse accompanying the applicant or joining the applicant in the Republic, a copy of a marriage certificate or proof of a relationship and payment of the applicable application fee.⁶⁵ These are the generic requirements.

3.3.1 *Staff mobility*

In most instances, a prospective staff member seeking employment in an institution of education or training would apply for a general work visa under the auspices of section 18 of the Regulations. Such an application in addition to the generic requirements would have to include a written undertaking by the employer accepting responsibility for the costs related to the deportation of the applicant and his or her dependent family members, should this become necessary, a police clearance certificate, a certificate from the Department of Labour confirming that despite a diligent search, the prospective employer has been unable to find a suitable citizen or permanent resident with qualifications or skills and experience equivalent to those of the applicant; proof that the applicant has qualifications or proven skills and experience in line with the job offer; that the salary/benefits are not exploitative and a copy of the contract of employment; proof of the qualifications evaluated by SAQA, full particulars of the employer, an undertaking by the employer to inform the Director-General should the applicant not comply with the provisions of the Act or the conditions of the visa; and an undertaking by the employer to inform the Director-General upon the employee's no longer being in the employ of the employer or when he or she is employed in a different capacity or role.⁶⁶

Of major concern in these requirements is the certificate from the department of labour that has to accompany the application, confirming that the prospective employer has been unable to find a suitable citizen or permanent resident with qualifications or skills and experience equivalent to those of the applicant. It renders the interviews and short listing processes conducted by an academic institution prior to offering such a foreign applicant fruitless, since the Department of Labour, through the *Employment Service Bill*, would have to be satisfied that there are no South Africans or permanent residents with the required skills and that the employer has made use of public and private employment agencies to

⁶⁵ Regulation 9 of the *Immigration Regulations*.

⁶⁶ Regulations 18(1)-(3) of the *Immigration Regulations*.

ascertain this.⁶⁷ The Department of Labour may exercise discretion in such matters, and this certificate may be withheld. This is a stringent requirement that frustrates most job seekers from the SADC region. Moreover, since the process of recruiting a foreign national is marred by numerous requirements, most employers, especially through their recruiters, are hesitant to follow such a long process, which leads to institutional inertia every time a foreign applicant is to be considered. These consequences do not make movement any "freer," as required by article 3(g) of the *SADC Protocol on Education and Training* and article 2 of the *Protocol on the Facilitation of Movement of Persons*.

Also, it should be noted that the SADC region shares a common position on human rights.⁶⁸ This common position as outlined in article 4 of the Treaty and the *Charter of the Fundamental Social Rights*⁶⁹ is a foundation that allowed South Africa to enforce the *Campbell* decision of the SADC Tribunal against Zimbabwe in *Government of the Republic of Zimbabwe v Fick*.⁷⁰ It is through this that the following argument finds validity. The contemplated Department of Labour certificate raises an issue of substantive fairness. It is manifestly unjust for the rights of a foreign applicant who was diligent enough to apply for a job and attend an interview to be subordinate to that of a citizen who did not apply for the job despite his or her possessing the same skills and qualifications. *Prima facie*, this appears to be an unfair labour practice since there is no constitutional basis to exclude in *toto* the application of basic human rights because of the foreign status of a SADC citizen. In the cases of *Baloro v University of Bophuthatswana*⁷¹ and *Discovery Health Limited v CCMA*⁷² the courts affirmed that the bill of rights, fair labour practices, equality and dignity apply to foreign nationals as well as to locals. The interpretation and application of these rights should not be viewed in a narrow national context but in the broader context of the *SADC Treaty*, a treaty that envisages the achievement of the goals of an African Union.

⁶⁷ Section 8(2) of the *Employment Services Bill* 2012, which allows the Minister, after consulting the Board, to make regulations to facilitate the employment of foreign nationals, which regulations may include the following measures: (a) The employers must satisfy themselves that there are no other persons in the Republic with suitable skills to fill a vacancy before recruiting a foreign national; (b) the employers may make use of public employment services or private employment agencies to assist the employers to recruit a suitable employee who is a South African citizen or permanent resident.

⁶⁸ Article 4(c) of the *SADC Treaty* (1992).

⁶⁹ *SADC Charter of the Fundamental Social Rights* (2003).

⁷⁰ *Government of the Republic of Zimbabwe v Fick* 2013 5 SA 325 (CC).

⁷¹ *Baloro v University of Bophuthatswana* 1995 4 SA 197 (B).

⁷² *Discovery Health Limited v CCMA* 2008 7 BLLR 633 (LC).

3.3.2 Access to higher education for foreign students

A student who wishes to enrol in a South African higher education institution would have to apply for a study visa under section 12 of the Regulations. In addition to the generic requirements, such a prospective student would also have to submit an official letter confirming provisional acceptance or acceptance at that learning institution and the duration of the course, a police clearance certificate, proof of medical cover, an undertaking by the parents or legal guardian that the learner will have medical cover for the full duration of the period of study, and proof that sufficient financial means will be available to the learner whilst resident in the Republic.⁷³ Both work and study visa applications have to be made in person to a foreign mission of the Republic, where the applicant is ordinarily resident or holds citizenship.⁷⁴ This implies that a new applicant cannot make an application for a visa within the country. Applicants cannot also launch an application for a change of the status of a visa or its conditions within the Republic.⁷⁵ Only a few exceptions apply to this rule, such as when a person is in need of emergency, lifesaving medical treatment.⁷⁶

South African immigration experiences would seem to run counter to SADC's vision of integrating Southern Africa, allowing students in the region freer access to education, and the eventual elimination of stringent barriers to higher education. To begin with, there has been a wave of delays that have plagued the processing of all visas in general. These delays have also been experienced widely by students who have applied for study visas.⁷⁷ The magnitude of these delays has been so extreme that some students have had to watch as their peers commence classes or research whilst waiting for their visas to be processed.⁷⁸ In 2014 the Department appointed a company (VFS Global) to receive and manage visa and permit applications in South Africa. The company has been given the mandate to automate the application processes, develop a solution for biometric intake in line with the immigration regulations, manage a dedicated permitting call centre and deliver outcomes to clients efficiently and timely. The VFS processing cost is R1350 excluding the South African

⁷³ Regulations 12(1)-(4) of the *Immigration Regulations*.

⁷⁴ Regulation 9(2)(a) of the *Immigration Regulations*.

⁷⁵ Regulation 9(5) of the *Immigration Regulations*.

⁷⁶ Regulation 9(9) of the *Immigration Regulations*.

⁷⁷ Public Service Commission *Report on the Evaluation of Service Delivery*.

⁷⁸ See for instance CPUT 2012 <http://www.cput.ac.za/newsroom/news/article/1679/registration-assistance-for-international-students>; Grocott's Mail 2012 <http://www.grocotts.co.za/content/students-face-study-permit-nightmare>.

Home Affairs fees and a Home Affairs application fee of R425. It was hoped that this would bring an end to the administrative backlogs, but in early 2015 the same challenges surfaced again and the department had to allow students to register in tertiary institutions without valid study visas.⁷⁹ This intervention signals the multitudinous requirements that students have to face before they commence their studies in South Africa, and is a policy practice that defeats the purpose of the *SADC Treaty* and the *Education Protocol* to eliminate barriers to education. Further, if they have resided in South Africa previously, students are required to submit a police clearance certificate as part of their application for a study visa. This certificate has to be obtained from the South African Police Services and in most instances the SAPS is unable to produce it timeously. This then prolongs the whole application process further.

In addition, the immigration laws require that the learner have medical cover for the full duration of the period of study. This medical cover has to be from a recognised South African institution. Coupled with this, learning institutions have recently begun being very firm with international students, requiring that they pay all their fees in full before they commence their studies.⁸⁰ This does not apply to South African students, which contradicts the *SADC Protocol* requiring that students from SADC countries be treated the same as home students for the purposes of fees and accommodation in higher education.⁸¹ Requiring an aspiring student to pay within a short space of time the application fees (VFS, Home Affairs and university), medical aid fees, tuition and residence fees has the undesirable effect of rendering South African higher education accessible to the sons and daughters of only a few privileged families in Southern Africa. Various studies have already indicated that South Africans and African society in general struggle to afford the rising cost of higher education.⁸² With most of the financial aid available in the country aimed at supporting South African students, international students have a steeper financial hill to climb than their South African counterparts. These practices defeat the SADC objective of treating SADC and home students the same, and fall

⁷⁹ Intergate Immigration 2015 <http://www.intergate-immigration.com/blog/appeal-applications>.

⁸⁰ UFS 2014 <http://supportservices.ufs.ac.za/content.aspx?id=119>; University of the Witwatersrand 2015 http://www.wits.ac.za/prospective/international/11395/financial_information.html; Stellenbosch University 2015 <http://www0.sun.ac.za/international/prospective-students/full-degree-undergraduate/i-want-to-enrol-at-su-2/fees-1.html>

⁸¹ Article 7(5) of the *SADC Protocol on Education and Training* (1997).

⁸² Oketch 2003 *PJE* 88-106; Wangenge and Cloete 2008 *SAJHE* 906-919; Spreen and Vally 2006 *Int J Educ Dev* 352-362.

short of the requirement placed on member states to ensure that there is a relaxation of formalities to be addressed by students from the SADC region.

4 The sovereign predicament

The discussion above shows that there are two divergent legal pathways relating to SADC students. On the one hand, the international law obligations that South Africa has entered into oblige South Africa to reform its immigration policies with the aim of adopting a "freer", non-bureaucratic stance towards SADC citizens, whilst on the other hand the immigration policies contain provisions that stifle the attainment of regional objectives. In this context it should be noted that the immigration and labour departments have a constitutional mandate to defend the country's sovereignty, national security, public safety and social stability, and to take decisions that alleviate pressure on social services. The undermining of immigration laws also prevents orderly migration. This leads to the extortion, abuse and exploitation of migrants who have fraudulent documents or no documents.⁸³ The protection of sovereign interests is not a phenomenon that is practised by South Africa only, but is practised by most other African countries as well. This is evident from the slow ratification of international law standards by most SADC countries. Due to their low level of political commitment and their perception of the losses and sacrifices involved, a number of countries including South Africa have been reluctant to fully implement integration programmes in a timely manner.⁸⁴ The phenomenon of perceived losses is captured in a paper that explored the harmonisation of the legal professions within the SADC, with particular emphasis on Botswana and South Africa. *Ngandwe* identified various motives as to why governments do not pursue regional objectives with much enthusiasm. These included ignorance of regionalism and globalisation as well the view that potential foreign entrants to the professions are unnecessary competition, and a desire to bar them from penetrating the jealously protected national markets as a strategy that will "preserve" opportunities for citizens.⁸⁵ The higher education sector is also not immune to these sentiments.

The complexity of these issues reopens the whole debate on the legal position of international law as against the domestic laws of member

⁸³ Apleni 2014 <https://megaslides.com/doc/2462317/implementation-of-immigration-amendment-acts-2007-and-201....>

⁸⁴ Maruping "Challenges for Regional Integration" 129.

⁸⁵ Ngandwe 2013 *C/LSA* 380.

states. It is already settled practice that the decision of a country to enter into or not to enter into an international agreement is an exercise that rests solely on the sovereign authority of such a country. This is the position that was upheld by the Permanent Court of International Justice in the *SS Wimbledon Case*, wherein it declined to see in the conclusion of any treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty.⁸⁶ More closely related to SADC regional integration efforts are the experiences of the European Union. The European Court of Justice has in the case of *Loos v Nederlandse Administratie der Belastingen* articulated that the regional community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights. Independent of the legislation of member states, regional law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the treaty, but also by reason of obligations which the treaty imposes in a clearly defined way upon individuals, as well as upon the member states and upon the institutions of the community.⁸⁷

In the African context, the decisions of the East African Community (EAC) Court of Justice are relevant. In *Mohochi v. Attorney General of Uganda*,⁸⁸ a case also relating to immigration practices, the domestic laws of Uganda pertaining to immigration control were contested against the Treaty objectives aspiring to promote the free movement of persons, labour, and services within the region. In summary, the Court concluded that the *National Citizenship and Immigration Control Act* of Uganda contained provisions that defeated the aims of the EAC. In particular, section 52 of the Act was pronounced to be inconsistent with Uganda's treaty objectives, since it also denied persons the right to fair and just administrative action, the right to information and freedom of assembly, association and movement guaranteed by the EAC Treaty and other relevant human rights instruments. The Court ordered that:

... on matters pertaining to citizens of the Partner States, any provisions of Section 52 of Uganda's Citizenship and Immigration Control Act formerly inconsistent with provisions of the Treaty and the Protocol were rendered inoperative and have no force of law, as of the respective dates of entry into

⁸⁶ *SS Wimbledon Case* 1923 PCIJ (Ser A) 1.

⁸⁷ *Loos v Nederlandse Administratie der Belastingen* 1963 ECR 1.

⁸⁸ *Mohochi v Attorney General of Uganda* (EACJ) Ref No 5 of 2011 of 17 May 2013.

force of the Treaty and the Protocol as law applicable in the Republic of Uganda.⁸⁹

In *Sebalu v The Attorney General of the Republic of Uganda*⁹⁰ the court heard an application seeking to declare that Uganda's inability to meet a deadline for submitting written comments on the draft protocol to operationalise the extended jurisdiction of the EAC Court was a failure by Uganda to ensure that affected persons may appeal decisions of the Court. The Court, relying on instruments that Uganda had ratified, concluded that the "delay to extend the appellate jurisdiction in the then circumstances was a contravention of the fundamental principles of good governance, freedoms and rights, thereby infringing the Treaty".⁹¹ The EAC was thereafter advised by the Court to take corrective measures against the Ugandan government.

These cases illustrate that once a state has exercised a sovereign decision to become part of a regional community or enter into international agreements, such a state is bound to fulfil the obligations that emanate from such a region. In fact, it has been argued in other jurisdictions that treaty provisions can give rise to a legitimate expectation enforceable by affected persons on the basis of administrative fairness. This was successfully argued in the Australian case of *Minister for Immigration and Ethnic Affairs v Teoh*.⁹² It therefore becomes a settled debate that South Africa and other SADC member states are required under international law to fulfil the obligations that emanate from the *SADC Protocol on Education and Training* and the *Protocol on the Facilitation of Movement of Persons*.

The issues and decisions that have been discussed so far relate to access to education, the movement of labour and services, and immigration requirements. These fall within the ambit of socio-economic rights. The circumstances of the SADC region and South Africa should, however, be taken into consideration when evaluating the implementation of their international socio-economic obligations. Having ushered in a democratic dispensation only two decades ago, South Africa is the youngest democracy in the SADC region and therefore a lot of work is still required in order to address the poverty and economic inequalities that exist within

⁸⁹ *Mohochi v Attorney General of Uganda* (EACJ) Ref No 5 of 2011 of 17 May 2013 para 130.

⁹⁰ *Sebalu v The Attorney General of the Republic of Uganda* (EACJ) Ref No 1 of 2010 of 30 June 2011.

⁹¹ *Sebalu v The Attorney General of the Republic of Uganda* (EACJ) Ref No 1 of 2010 of 30 June 2011 para 30.

⁹² *Minister for Immigration and Ethnic Affairs v Teoh* 1995 128 ALR 353.

the country. A recent indicator of this is the #feesmustfall demonstrations that reaffirmed the existence of the financial challenges facing those seeking access to higher education in the country.⁹³ Further, there are real disparities between the economies of the SADC member states, and thus the fulfilment of regional aspirations may require governments to jointly address the socio-economic factors that affect the region.⁹⁴ Two doctrines are recognised by the jurisprudence of international law as applicable in these circumstances. The doctrine of "progressive realisation" introduces an element of flexibility in terms of state obligations and also in the enforcement of rights.⁹⁵ The concept recognises that the full realisation of socio-economic rights will not always be achieved in an instant. The obligation on states therefore is "to move as expeditiously and effectively as possible" towards the full realisation of the SADC objectives. This doctrine also recognises that "cooperation for development" amongst SADC member states remains an avenue that complements the achievement of socio-economic rights,⁹⁶ thus signalling the need to strengthen synergy between SADC member states.

The doctrine of the "margin of appreciation", which is used mostly by international tribunals or authorities whenever they have to evaluate the decisions of national authorities against their international obligations also finds relevance in this context.⁹⁷ What this doctrine entails is that courts should allow national governments a measure of discretion and flexibility in the manner in which they execute their international obligations. The rationale underpinning this flexibility lies in the premise that judicial authorities are often too remote from the resource constraints, capacity deficiencies and other factors that national authorities have to grapple with on a regular basis.⁹⁸ Like "progressive realisation", this doctrine does not exempt national authorities from accountability but rather allows them the flexibility to explore various ways of meeting their international obligations, taking their domestic circumstances into consideration. Once more, what is expected is that concrete efforts should be taken by national authorities to meet their obligations. In this light, South Africa has made much progress in modernising its visa processes and ensuring that regional security concerns, illicit financial flows, fraud, corruption, human and drug

⁹³ Paphitis 2005 *CRiSTaL* 89-92.

⁹⁴ Alden and Mills 2005 *J Mod Afr Stud* 367-392.

⁹⁵ *CESCR General Comment No 3: Nature of States Parties Obligations* (1990) para 9.

⁹⁶ *CESCR General Comment No 3: Nature of States Parties Obligations* (1990) para 14.

⁹⁷ Shany 2005 *EJIL* 909.

⁹⁸ Shany 2005 *EJIL* 909.

trafficking are minimised through its new visa regimes.⁹⁹ These efforts are commendable and in fact benefit the whole SADC region. It is in this wider context in which South African efforts to meet its regional obligations should be viewed, but there are still some legislative intricacies and unforeseen consequences of such legislation, as identified by this paper, that require review.

5 Conclusion and recommendations

This paper has given a synopsis of how SADC functions and the international law implications of entering into a treaty for a sovereign state. It has illustrated how South African immigration regulations, though established out of good intentions, have the undesired effect of defeating the treaty objectives of SADC. The implementation of domestic law may require closer scrutiny in order to establish a workable equilibrium between national interests and regional aspirations. Whilst the EAC and other regions have made notable progress in clarifying the position of these interests, the ideal Southern African body to adjudicate on this would have been the judicial arm of SADC, namely the SADC Tribunal. The founding documents of the SADC Tribunal gave it powers to adjudicate on the interpretation and application of the *SADC Treaty* as well as to develop its own jurisprudence having due regard to the general principles and rules of public international law and any rules and principles of the law of member states.¹⁰⁰ However, the judicial body has been rendered inoperative since 2010 and this is likely to remain the position until the new protocol receives the requisite number of ratifications. This entails that the adjudication of South African immigration reforms against the doctrines of the "margin of appreciation" and "progressive realisation" will remain in the realm of academic and policy debates.

Pending ratification of the new SADC Tribunal protocol, the SADC Parliamentary Forum and the Council of Ministers are technically positioned to be the bodies that will strengthen inter-governmental consultation with national legislatures, NGO's and policy advisors. This is due to the fact that these bodies are composed of ministers and parliamentarians from the respective member states - the same officials who determine the domestic legislative direction at national level. It is recommended that Ministers, and in this instance Ministers whose decisions have an impact on the mobility of staff and students in the higher

⁹⁹ Apleni 2014 <https://megaslides.com/doc/2462317/implementation-of-immigration-amendment-acts-2007-and-201....>

¹⁰⁰ Article 21(b) of the *SADC Protocol on the Tribunal* (2000).

education sector, devote sufficient political will to extensively engaging the SADC Parliamentary Forum on legislative proposals emanating from national level. This will ensure that national legislatures are privy to perspectives from both the domestic and the regional levels before implementing new regulations. This would also strengthen the ties within the region.

The SADC Council of Ministers is currently configured to direct, coordinate and supervise the operation of the SADC institutions as per article 11 of the Treaty. There is, however, no explicit provision that empowers the Council to broaden the scope of their oversight to include not only matters at regional level but also matters decided at national level that have a direct impact on the success of regional priorities. Their focus as derived from article 11 of the Treaty is concerned with SADC operations. This entails that the Council does not have jurisdiction to interrogate, advise or influence the decisions made at national level. To a certain degree, this limitation contributes to the different levels of political will and commitment with which regional objectives are interpreted by member states. It is therefore recommended that the Summit explores and rectifies this deficiency.

Further, the failure of SADC to bring about synergy between national and regional policy makers is also evident in the functioning of the SADC National Committees. The *SADC Treaty* requires that these Committees be established in each member state and serve as a regional participatory policy development platform that coordinates and oversees, at the national level, the implementation of SADC programmes of action. However, these Committees have been dysfunctional in most member states. A study in 2003 revealed that the National Committees in South Africa were plagued by understaffing, unqualified personnel, a lack of understanding of internationalisation and an absence of mechanisms to integrate their role into government systems.¹⁰¹ A subsequent 2009 study revealed that South Africa had actually rendered their SADC National Committee inoperative by usurping its mandate to the African Renaissance Committee (ARC), a body within the Department of International Relations and Cooperation.¹⁰² This has had the effect of completely nullifying the intended role of the SADC National Committee. It should be borne in mind that the SADC National Committees were designed to report to SADC structures,

¹⁰¹ Nzewi and Zakwe 2009 <http://dspace.africaportal.org/jspui/bitstream/123456789/30593/1/RR122.pdf?1> 19.

¹⁰² Nzewi and Zakwe 2009 <http://dspace.africaportal.org/jspui/bitstream/123456789/30593/1/RR122.pdf?1> 19.

whereas the current ARC reports to government. This shift in reporting lines raises questions about the institutional independence of the ARC to advocate for SADC interests. Against this background, it is recommended that all member states, including South Africa, engage in a process to revitalise the efficiency and functioning of all SADC structures, in particular the SADC National Committees.

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List of Abbreviations

AEC	African Economic Community
ARC	African Renaissance Committee
AU	African Union
CESCR	United Nations Committee on Economic, Social and Cultural Rights
CILSA	Comparative and International Law Journal of Southern Africa
CPUT	Cape Peninsula University of Technology
CRiSTaL	Critical Studies in Teaching and Learning
DBE	Department of Basic Education
DIRCO	Department of International Relations and Co-operation
EAC	East African Community
EACJ	East African Court of Justice
EJIL	European Journal of International Law
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
Int J Educ Dev	International Journal of Educational Development
Int J Polit	International Journal of Politics
IO	International Organization

J Mod Afr Stud	Journal of Modern African Studies
OAU	Organisation of African Unity
PCIJ	Permanent Court of International Justice
PJE	Peabody Journal of Education
PMG	Parliamentary Monitoring Group
SADC	Southern African Development Community
SAJHE	South African Journal of Higher Education
SAPS	South African Police Services
SAQA	South African Qualifications Authority
UFS	University of the Free State